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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 1529

LEE ALMENDAREZ,

Petitioner

v.

THE STATE OF TEXAS,

Respondent

On Petition for Writ of Certiorari to
The Court of Criminal Appeals of Texas

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Now comes The State of Texas, Respondent herein, and files this his Response in reply to Petitioner's Petition for Writ of Certiorari heretofore filed herein.

OPINION BELOW

The opinion of the Court of Criminal Appeals of Texas is reported at 460 S.W.2d 921 (Tex.Crim., 1970). A copy is attached to the Petition as Appendix "A" at pages 7 to 11.

JURISDICTION

The jurisdictional requisites would appear to be adequately set forth in the Petition, although Respondent disputes Petitioner's contention that any

rights guaranteed by the United States Constitution have been denied.

QUESTIONS PRESENTED

Petitioner presents one question for review by this Court. This question may be restated as follows:

Was there sufficient probable cause for Petitioner's warrantless arrest and were the fruits of the search incident to such arrest admissible in evidence?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States are cited by Petitioner as being involved in this case.

STATEMENT OF THE CASE

Petitioner was tried before a jury and convicted of unlawful possession of a narcotic drug, to-wit: Marihuana, in the 176th District Court of Harris County, Texas. He was sentenced to life imprisonment in the Texas Department of Corrections.

The crime for which Petitioner was tried and convicted occurred on March 18, 1968, in Houston, Harris County, Texas. Officer Michael Chavez, who had been a narcotics officer with the Houston Police Department for fifteen years, and three other officers received instructions by telephone to proceed to a given address to contact an informant who had on two previous and recent occasions given him information which had proved to be true and correct. The informant gave Officer Chavez information concerning Petitioner whom Chavez had known for approximately a year

and on whom he had been maintaining an "on and off" surveillance for the preceding three weeks. The informant told Chavez that within the next few minutes, Petitioner and a Latin-American female companion would be driving at a specific intersection and that both would be in possession of Marihuana. He gave Chavez an exact, detailed description of the two automobiles to be occupied by the two identified subjects.

With no time to obtain a search warrant, the officers drove immediately to the intersection indicated and found the Petitioner, whom Chavez knew well, and the female driving the two described automobiles. After signaling the cars to pull over, the officers prevented Petitioner from disposing of a Marihuana cigarette in his pocket. When the trunk of Petitioner's car was opened, one of the officers related there was a strong Marihuana odor. A search of the trunk revealed ninety-two (92) pounds of what was found to be Marihuana worth approximately $120,000.00.

After conviction, Petitioner appealed to the Court of Criminal Appeals of Texas and that Court affirmed the judgment on November 10, 1970.

ARGUMENT AND AUTHORITIES REASONS FOR DENYING THE WRIT

THERE WAS SUFFICIENT PROBABLE CAUSE FOR PETITIONER'S WARRANTLESS ARREST AND THE FRUITS OF THE SEARCH INCIDENT TO SAID ARREST WERE ADMISSIBLE IN EVIDENCE.

In urging the lack of probable cause for the warrantless arrest, Petitioner relies upon *Aguilar v. Texas,* 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964), and *Spinelli v. United States,* 393 U.S. 410, 89 S.Ct.

584, 21 L.Ed.2d 637 (1969), both of which decisions dealt with the sufficiency of an affidavit presented to a magistrate for the issuance of a search warrant to reflect probable cause.

The Court of Criminal Appeals of Texas in its opinion held that *Draper v. United States,* 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed.2d 327 (1959), controls this case. The informant there described details with a particularity which approached that of the informant in the instant case.

The United States Court of Appeals for the Fifth Circuit in *United States v. Acosta,* 411 F.2d 627, (1970), held that neither *Aguilar* nor its explication in *Spinelli* detracted from the continued vitality of *Draper.* Acosta was quoted with approval by the Court of Criminal Appeals of Texas in *Rangel v. State,* 444 S.W.2d 924 (Tex.Crim., 1969).

The Court of Criminal Appeals of Texas found that the officer had probable cause for the warrantless arrest of Petitioner, that the search incident thereto was legal and that fruits of such search were admissible in evidence. *Rangel v. State,* supra; *Alaniz and Villareal v. State,* 458 S.W.2d 813 (Tex.Crim., 1970); Article 14.03, Vernon's Texas Code of Criminal Procedure.

Both *Spinelli* and *Aguilar* were search warrant cases. In *Spinelli,* the Court said it was "especially important that the tip described the accused's criminal activities in sufficient detail so that the magistrate may know that he is relying on something more substantial than a casual rumor." The Court went on to state that such detail was present in the *Draper* case, would have been sufficient to permit a magistrate to infer that the informer had gained his information in a reliable way and was sufficient to establish probable cause.

There was certaintly probable cause for the arrest in the present case and an arrest which is lawful carries with it the right to make a search and seizure incidental thereto. *Price v. Texas,* 410 S.W.2d 778 (Tex. Crim., 1967); *Jones v. Texas,* 352 S.W.2d 270 (Tex. Crim., 1961); *Weeks v. Texas,* 417 S.W.2d 716 (Tex. Crim., 1967); *Houston v. Texas,* 428 S.W.2d 353 (Tex. Crim., 1968); *Hernandez v. Texas,* 435 S.W.2d 520 (Tex.Crim., 1968); *Garcia v. Texas,* 459 S.W.2d 840 (Tex.Crim., 1970).

The test of constitutional validity of an arrest as laid down in *Beck v. Ohio,* 379 U.S. 89, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964), and adhered to in *United States v. Acosta,* supra, is "Whether, at the moment the arrest was made, the officer had probable cause to make it—whether at that moment the facts and circumstances within their knowledge and of which they had reasonable trustworthy information were sufficient to warrant a prudent man in believing that Petitioner had committed or was committing an offense." Here, Respondent submits there was sufficient probable cause for the arrest. Here, as in *Acosta* and *Draper,* ample evidence of the reliability of the informant was also present.

CONCLUSION

Respondent urges that the Court of Criminal Appeals of Texas was correct in its opinion affirming the judgment of the trial court. For the reasons above stated, Respondent respectfully urges that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Gilbert J. Pena, Assistant Attorney General of Texas, certify that a copy of the foregoing Brief for Respondent in Opposition was served on the attorneys for Petitioner, by depositing same in the United States Mail, postage prepaid, certified mail, addressed to Mr. William E. Steen, Mr. L. J. Clayton, 1020 Houston First Savings Building, Houston, Texas 77002, on this the ____ day of April, 1971.

GILBERT J. PENA
Assistant Attorney General